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No. 85-1544

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN, INC.,
*Petitioner,*

v.

JACK D. ANDERSON,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana**

## REPLY OF PETITIONER

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## REPLY OF PETITIONER

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### I. RESPONDENT'S BRIEF DEMONSTRATES THE NEED FOR SUPREME COURT REVIEW OF THE VALIDITY OF THE RAILROAD INDUSTRY'S COLLECTIVE BARGAINING AGREEMENT DIRECTING SET-OFF OF PREVIOUSLY PAID MEDICAL EXPENSES

In its petition for certiorari, Burlington Northern Railroad Company ("BN") argued that review of the decision below was warranted because that decision exemplified a recurring conflict concerning the validity of a provision of a nationwide collective bargaining agreement directing that medical expenses advanced by employers be set-off in FELA cases.

In the Brief in Opposition to the Petition ("Opp. Cert."), respondent does not dispute the importance,

financial magnitude and recurring nature of the issue, does not reconcile the conflicting opinions, and does not justify the lower court's decision that the collective bargaining agreement is void. Instead, respondent vigorously argues that the medical payments in this case should be characterized as fringe benefits, that other courts have found such payments to be "collateral source" income, and that the language of the agreement at issue was not adequate to show the payments are not collateral source income. These arguments not only fail to address the analysis presented in the petition but, by mirroring the disagreement and confusion in the case law, actually illustrate the need for Supreme Court review.

Respondent argues that the divergent cases can be explained by a distinction between operating and non-operating employees. This assertion is incorrect. As respondent recognizes, as least since 1968 the same insurance plan has been applied to all union employees, operating and non-operating, on the same terms.[1] Respondent's distinction between operating and non-operating employees does not explain the conflict and is, in any event, illogical and unworkable.[2]

Failing to resolve the conflict, respondent argues that the decision below is consistent with the weight of au-

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[1] *See* Opp. Cert. at 4. Contrary to respondent's suggestion, when the operating employee unions were included in the Health and Welfare plan beginning in 1964, the parties *did* understand and explicitly stated that the on-duty injury coverage was *not* provided as a wage-equivalent. *See* Letter from National Railway Labor Conference to L.J. Wagner and C. Luna (March 26, 1964), *cited in* Brief of the Association of American Railroads, *et al.*, as *Amici Curiae* at 7 n.6, App. at 15a.

[2] Respondent also incorrectly describes Travelers' Group Policy GA-23,000 as a payroll-deduction plan. *See* Opp. Cert. at 5. The *amici curiae* provide a more accurate description. *See* Brief *Amici Curiae* at 7-8. As a general matter it is not the employees themselves but the railroads and rail employee unions that make up the "Policyholder" for GA-23,000.

thority finding on-duty injury payments under GA-23,000 to be "collateral source" benefits. The decision singled out in respondent's text, however, *Clark v. Burlington Northern, Inc.*, 726 F.2d 448 (8th Cir. 1984), *see* Opp. Cert. at 6, does not support his position. The dictum quoted by respondent merely recites the conventional principle that the nominal payment of insurance premiums by an employer does not end the inquiry into whether the insurance is "collateral." The *Clark* court went on to give effect to the parties' contractual agreement that medical expense payments would offset FELA damages. It rejected arguments similar to those made by respondent, observing "[t]he employer's manifest intent to avoid double liability in offering disability plans must be respected if the collateral source rule is not to swallow up 45 U.S.C. § 55 at the ultimate expense of employees." 726 F.2d at 451.

The remainder of respondent's cases are nothing more than decisions characterizing advance payment of medical expenses as collateral sources of income to employees. As the petition pointed out, there is also a substantial body of case law taking the opposite view.[3] It was be-

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[3] *See Petition* at 11 n.16. Respondent valiantly attempts to distinguish these cases, but in so doing confuses the conflicting rulings that served as a backdrop to the present controversy with the conflicting rulings on which the petition is based. *See, e.g.*, Petition at 13 n.20, 14 nr.22 & 23. For example, respondent discusses *Thomas v. Humble Oil & Refining Co.*, 420 F.2d 793 (4th Cir. 1970), but fails to note that in that case the Fourth Circuit declared a collective bargaining agreement analogous to the 1975 Health and Welfare Agreement to be *valid* under Section 5 of the FELA. Similarly, respondent attempts to minimize the significance of *Wagner v. Reading Co.*, 428 F.2d 289 (3d Cir. 1970), but must concede that this case states the law of the Third Circuit. *See Thomas v. Penn Central Co.*, 379 F. Supp. 24 (W.D. Pa. 1974). In all, at least three circuits (the Third, Fourth and Eighth), as well as a number of prominent district court decisions, have reached results clearly in conflict with the decision below and like decisions. *Compare* Petition at 13 n.20 *with id.* at 14 n.22 & 23.

cause of this apparent confusion in the courts concerning the nature of on-duty injury payments under GA-23,000 that the parties felt the need to clarify their intent through the 1975 Health and Welfare Agreement at issue in this case.

Respondent's brief largely overlooks the actual issue decided by the court below and presented by this petition —whether such a clarifying statement by the parties in a collective bargaining agreement violates Section 5 of the FELA. Significantly, respondent does not attempt to defend the lower court's ruling on its own terms, but advances several other theories that purportedly justify the result. First, respondent argues at some length that Section 5, as revised in 1908, was meant to encompass a wide variety of devices or arrangements even if not labeled "contracts." *See* Opp. Cert. at 9-10. As there is no dispute that a "contract" (*i.e.*, a collective bargaining contract) is involved in this case, this argument is wholly superfluous.[4]

Second, respondent suggests that set-off should be denied in this case because the parties did not explicitly characterize the medical expense payments as "indemnity" or "non-wage equivalent." *See, e.g.*, Opp. Cert. at 4, 11, 13, 15. Importantly, respondent thus acknowledges that whether certain employee "benefits" are to be deemed collateral is a matter that is legitimately within the control of the negotiating parties.[5] Neither FELA nor the

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[4] Also irrelevant is respondent's citation of *Eichel v. New York Central Railroad*, 375 U.S. 253 (1963). The *Eichel* court disallowed an offset for retirement benefits paid by the Railroad Retirement Fund on the grounds that the benefits received were "not directly attributable to the contribution of the employer," and because this federal program was "substantially a Social Security Act for employees of common carriers." Neither of these factors is applicable in this case.

[5] That principle, highlighted in Judge Friendly's concurrence in *Blake v. Delaware & Hudson Railway*, 484 F.2d 204 (2d Cir. 1973), was recently re-affirmed in an analogous context by the Ninth Cir-

common law collateral source doctrine, however, requires ritual incantation of magic words. Moreover, it is difficult to imagine how the parties could have expressed their intent any more clearly than by the set-off language in this Agreement and surrounding correspondence.

Having conceded that Section 5 does not create a blanket prohibition forbidding set-offs to account for advance payments by a railroad defendant, respondent argues that Section 5 and its proviso allow a maximum set-off of "the premiums, not what the premiums bought." *See* Opp. Cert. at 11. As petitioner has described, this concept is an erroneous judicial gloss that has been uncritically accepted and repeated by several courts. *See* Petition at 18-20. Respondent has failed to respond to any of the legislative history pointed out by petitioner, which establishes that an employer is entitled to a full offset where the employer bore the entire cost of funding the plan.

Moreover, the "premium paid not benefits bought" theory is impractical as a realistic matter and nonsensical as a matter of policy. As the *amici curiae* describe, the funds used for on-duty injury expenses are contributed exclusively by the railroads and in lump sums. *See* Brief *Amici Curiae* at 7-8; Petition at 19-20. Any requirement that the railroads prove the "premiums" paid with respect to particular employees would simply be incongruous and unmanageable in light of the structure of the policy. Furthermore, even if such per-worker or per-injury "premiums" could be identified, allowing credit only for such premiums would give railroads no incentive to provide such plans at all, and employees would lose the benefit of prompt reimbursement for medical services.

Respondent offers the final argument that these cases involve divergent factual situations, and that "it is not only unnecessary but legally impossible to arrive at a

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cuit in *Gardiner v. Sea-Land Service, Inc.*, Nos. 84-2354, 84-2547 (9th Cir., April 8, 1986) (collective bargaining agreement setting low rate for maintenance does not abrogate this maritime right but seeks to "preserve it as part of the negotiating process").

single decision which will anticipate and resolve" these cases. *See* Opp. Cert. at 16-17. This assertion ironically dramatizes the need for Supreme Court review. In reality, the issue posed by these cases involves relatively few material facts and in all of the cases cited by both parties these material facts are identical. Most of the cases even involve the same insurance documents. The failure of the courts to adopt any consistent approach, coupled with their rejection of the parties' efforts to resolve the issue by a nationwide collective bargaining agreement, has left this entire area of the law in complete disarray. Supreme Court review is necessary to clarify the proper approach to this constantly recurring problem and to permit the development of mutually satisfactory ways of assisting injured employees.[6]

## II. RESPONDENT HAS ALSO IGNORED THE CONFLICT WITH RESPECT TO THE PREJUDICIAL IMPACT ON AN FELA JURY AWARD OF A FAILURE TO FOLLOW THIS COURT'S TEACHINGS IN *LIEPELT*

BN's petition argued that Supreme Court review of this case was also necessary to resolve a conflict between a large number of appellate court decisions concerning

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[6] As the *amici* have pointed out, this case also presents a timely opportunity to reassess the collateral source rule for federal question cases. *See* Brief *Amici Curiae* at 11 n.17. The Attorney General's Tort Policy Working Group recently concluded:

> In an era when collateral sources of income were financed largely by plaintiff himself, the collateral source rule may have been sensible. Today, however, when many collateral sources are provided or subsidized by the government or by third parties (such as employers, who often are required by law to provide certain collateral benefits), the traditional justification is called into question. Increasingly, the collateral source rule simply permits a windfall recovery by the plaintiff.

*See* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability, 71 (Feb. 1986).

the prejudicial effect of a trial court's failure to instruct a jury on the tax consequences of an FELA damage award. *See* Petition at 23-26. Throughout his Brief in Opposition, respondent assumes the very issue that remains in conflict—whether to apply a harmless error standard for reviewing a lower court's refusal to give a *Liepelt* [7] instruction, as was done in this case, or to hold that such a ruling is inherently prejudicial.

While respondent correctly notes that this Court has denied certiorari review in a number of cases applying a harmless error standard when a nontaxability instruction is refused by a trial court,[8] such a statement proves too much. The fact that this issue continues to be brought to the attention of this Court demonstrates the recurring nature of the dispute and the need for a definitive ruling. Absent clarification by the Court of the import of its decision in *Liepelt*, lower courts will remain divided on this important FELA damages question.[9]

Moreover, in his zeal to find support for the Montana Supreme Court's erroneous rulings, respondent has engaged in precisely the kind of speculation that this Court sought to eliminate in *Liepelt*. Respondent acknowledges that BN presented evidence tending to show lost earnings as low at $115,000,[10] which was well below the jury's ver-

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[7] *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490 (1980).

[8] *See* Opp. Cert. at 17-21 & n.60. *See also Oltersdorf v. Chesapeake & Ohio Railroad*, 404 N.E.2d 320 (Ill. App. Ct. 1980), *cert. denied*, 450 U.S. 920 (1981), where certiorari review was denied of a state appellate court decision holding that the refusal to give a requested nontaxability instruction required a new trial on damages without any analysis of the nature or extent of the error.

[9] Just last term the Court summarily reversed a lower court decision in an FELA damage case after twice denying certiorari review on precisely the same issue. *See St. Louis Southwestern Railway v. Dickerson*, —— U.S. ——, 105 S. Ct. 1347 (1985).

[10] *See* Opp. Cert. at 19 n.50. The fact that respondent objected to the introduction of this evidence is irrelevant for purposes of

dict of $195,000. While respondent would have the Court attribute this difference to damages for pain and suffering, it is equally likely that the jury artificially inflated some portion of this amount to account for income taxes.[11] In any event, such speculation as to the deliberations of the jury merely highlights the difficulty in applying a harmless error standard to these cases. *See Liepelt*, 444 U.S. at 497-98 (reversing a lower court "[w]hether or not this speculation is accurate").

Finally, respondent would have this Court refrain from reviewing even the lower court's refusal to follow the second prong of *Liepelt* concerning the taxes payable on respondent's lost earnings because the Montana Supreme Court did not address this issue on appeal. Respondent does not dispute the fact that BN properly raised this matter in its original appeal to the Montana Supreme Court and again on rehearing. *See* Petition at 27. It is well settled that this Court's reviewing powers can be invoked whenever a federal question is either "pressed" or "passed upon" in the courts below.[12] To hold otherwise would substantially undermine this Court's jurisdiction by allowing a lower court to avoid review of

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BN's appeal and petition for writ of certiorari. The trial judge denied this objection and permitted the jury to consider this evidence. The question whether the jury's award was artificially inflated is thus properly framed for this Court.

[11] At trial, BN proffered income tax returns which revealed that between 1974 and 1982 respondent paid approximately 17 percent of his gross earnings in taxes. *See* Petition at App. 21a-23a. Clearly, such an amount cannot be deemed *de minimis* or harmless as suggested in respondent's brief. *See* Opp. Cert. at 22-23. Moreover, the offer of proof in this case—actual tax payments—was of much greater relevance than the evidence proffered in *Marlow v. Atchison, Topeka & Santa Fe Railway*, 671 P.2d 438 (Colo. Ct. App. 1983), where only income tax withholding figures were adduced.

[12] *See Illinois v. Gates*, 462 U.S. 213, 217-20 (1983); *Wilson v. Cook*, 327 U.S. 474, 480 (1946); *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477 (1945); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

its decisions by consciously ignoring claims of error. In this case, BN vigorously "pressed" its claim of error below and therefore should be entitled to consideration of its petition on the merits.

Contrary to the teachings of *Liepelt*, the Montana Supreme Court has allowed an FELA verdict to be rendered which grossly overcompensates a plaintiff for lost past and future earnings. Not only was the jury allowed to consider only evidence of gross earnings, but it also was not made aware that its judgment would be tax free. Absent review of the decision below by this Court, the conflict will remain unresolved and juries will continue rendering inflated FELA damage awards in contravention of the express holdings in *Liepelt*.

Respectfully submitted,

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